

CHAPTER THIRTY-TWO

A NEW LEGAL COSMOS. LATE ROMAN LAWYERS AND THE EARLY MEDIEVAL CHURCH

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"Nor do We permit them [sc. heretics] to be enrolled amongst the most expert advocates, who above all others ought to have a proper understanding of the divine decrees, since they spend their life immersed in [the interpretation of] words (*logoi*)."¹

(Justinian, *Codex Repetitae Praelectionis* 1.5.12, 8.)

Sometime between the accession of Justinian on April 1 527 and the death of his co-emperor, Justin, four months later, the two emperors jointly promulgated an Imperial edict intended to increase the 'safety, honour and good name' of orthodox members of the holy Catholic Church (Justinian, *Codex* 1.5.12, referred back to - and extended - by Justinian *Codex* 1.5.18 (probably 529) and Justinian *Novel* 109pr. (541)).² Alongside a general threat that all those who did not worship God correctly would be deprived of 'even' their earthly goods (section 5) and a detailed set of practical measures dealing with various legal scenarios that might arise in families where one or more parents were not orthodox Christians (sections 18-20), Justin and Justinian's 527 enactment was concerned with removing heretics, especially 'the execrable Manichaeans', as well as Pagans; Jews; and Samaritans, who had infiltrated Imperial bureaucratic and military offices (sections 1 and 6-16. In referring to heretics as polluting and contagious (sections 2, 3 and 10) the drafter of the 527 constitution

¹ The original (Greek) text of this constitution comes from the *Basilica*, a late ninth-century imperial codification. With thanks to Bruce Frier for his help and advice on this text and its translation.

² . On Justinian's 'anti-pagan' persecutions see Corcoran 2009.

appealed to an age-old Roman rhetoric of exclusion that had first been (officially) used against manichees over two hundred and twenty years earlier, before the accession of Constantine as the first Christian emperor (Diocletian, 'Rescript Against the Manichees' (*Collatio* 15.3), probably issued in 302; see further Escribano Pano 2009: 46-51 and Section III below). Working in the imperial capital of Constantinople, in the politically and theologically-charged aftermath of the fourth ecumenical Council of Chalcedon (451) and its Christological debates, the drafter of the 527 constitution also voiced a new, practical, concern: if heretics, pagans, Jews and Samaritans were allowed to occupy any office of imperial dignity they would use that power to injure the interests of Orthodox Christians.³

In 409 the (Western) emperor Honorius had ordered that candidates for the imperial office of Defender of the City (*defensor civitatis*) could only be selected from baptized Catholics (Justinian, *Codex* 1.55.8, see also Justinian, *Codex* 1.4.19, 505); our 527 constitution adds the explanation that defenders of the cities cannot be heretics because they would thereby seem to acquire the power to judge and condemn Orthodox Christians, including Orthodox bishops (section 7). In 410 the (Eastern) emperor Theodosius II had barred heretics from imperial service, with the exception of those who filled the low-ranking office of provincial apparitor (*cohortalis*); our 527 constitution adds the new measure that heretical, pagan, Jewish or Samaritan *cohortales* must be prevented from acting as enforcement officers in any legal cases, public or private, against Orthodox Christians (section 6). The legislative rhetoric of Justin and Justinian's 527 constitution places it within a long tradition of Roman measures defining and policing 'religious' deviancy. Its determination to protect the 'orthodox' from the religious 'other', however, looks forward to

³ The full Acts of the 451 Council and related texts are now available in English translation: Price and Gaddis 2005. On Chalcedon's legacy see Louth 2015 and Schor 2011. One of Justinian's first legislative acts after the death of Justin in August 527AD was to promulgate the law later included in the *Codex Repetitae Praelectionis* (534AD, henceforth *Codex*) at 1.1.5: a legislative statement of the (pro-Chalcedonian) Imperial Orthodox faith, together with a condemnation of all heresies, especially those of Nestorius (d.450AD), Eutyches (d. around 456AD) and Apollinaris (d. 390AD).

the middle ages and beyond - to "whenever and wherever fear shapes public space" (Shafak 2016).

As section 11 of Justin and Justinian's 527 constitution explicitly states, the exclusion of heretics, pagans, Jews, and Samaritans from imperial bureaucratic positions was not all new. In 395 the imperial official in charge of the emperor's bureaucratic offices in Constantinople was ordered to investigate whether there were any heretics (specifically Eunomians) in imperial service; if found, they were to be removed and exiled from the city (*Codex Theodosianus* 16.5.29 and 16.5.25).⁴ In 404 the Western Emperor Honorius excluded (some) Jews and Samaritans from imperial service (*Codex Theodosianus* 16.8.16). The Eastern emperor Theodosius II legislated more widely, excluding heretics and pagans from a number of positions within the imperial *militia* (*Codex Theodosianus* 16.8.16, 404; 16.5.48, 410; 16.10.21, 416; and 16.5.65, 3, 428). Some 'heretics' seem to have attempted to turn this legislation to their advantage. In 410 Theodosius II ruled that decurions - individuals bound to the hereditary (civic) status of *curiales* - were not to be relieved of their obligations if they were found to be heretics. In 438 Theodosius restated this rule, clarifying that decurions who presented themselves as heretics did not thereby secure a release from their onerous financial burdens (Theodosius II, *Novel* 3.6, excerpted at Justinian, *Codex* 1.5.7). The first law, however, to require that (certain) imperial certificates of appointment had to include a statement of orthodox baptism dates to the second half of the fifth century, to the post-Chalcedonian age of the Leonid imperial dynasty (457-518).

In 468, just eight years before the deposition of the last Roman emperor of the West, the Eastern emperor Leo I issued a constitution addressed to his Praetorian Prefect,

⁴ For Eunomians being excluded from imperial service see also *Codex Theodosianus* 16.5.58, 7 (Theodosius II, 415) and 16.5.61 (Theodosius II, 423). The Western Emperor Honorius banned 'persons hostile to the Catholic sect' from imperial service within the palace at Ravenna in 408 (*Codex Theodosianus* 16.5.42). see also Valentinian III *Novel* 18.4 (445, specifying Manichees) and Justinian *Codex* 1.5.8, 6 (455, specifying 'Apollinarians' and 'Eutychians').

Nicostratus, ordering that no one should be admitted to a corporate body of advocates and attached to an imperial bureaucratic court unless they had first been 'initiated into the mysteries of the Holy Catholic Church' (Justinian, *Codex* 1.4.15, repeated at 2.6.8). In addition to documenting a required period of legal training (an innovation also introduced by Leo I: Justinian, *Codex* 2.7.11, 460), the official certificates of appointment for all advocates stationed at (Eastern) imperial courts now had to state that they were baptized Catholic Christians.⁵ Once again, Justin and Justinian's 527 constitution goes further. Having restated Leo's 468 requirement, the 527 text adds the explanation that skilled advocates should be expected to have a proper understanding of divine decrees - with a deliberate play here on 'divine' as referring to both God and emperor - precisely *because* they spend their lives interpreting (legal) pronouncements (Justinian, *Codex* 1.5.12, 8 quoted above). According to the drafter of the 527 constitution heretical advocates were, by definition, incompetent advocates: they had failed to understand the divine word(s) correctly.

The idea that a knowledge of Roman legal techniques would lead to a correct understanding of Christian Scripture, and thence to orthodox belief and practice, belongs to the age of Justinian (527-565). It was also specific to the Eastern Roman Empire (centred on the capital of Constantinople, but encompassing Asia Minor, the Levant, the Eastern Balkans and beyond). In the West: "The eclipse of imperial authority... during the fifth century created new conditions for its churches and demanded new definitions of their relation to the emperor... The reunion of the western provinces with Constantinople during Justinian's reign highlighted and even reinforced these differences." (Sotinel 2005: 267. For a concrete example see Cooper 2016) The imperial constitution that ordered the compilation of

⁵ On imperial certificates of appointment see *Codex Theodosianus* 8.7.21-22 (Theodosius II, 426AD); Justinian, *Codex* 1.5.12, 11 (Justin and Justinian, 527 AD); Justinian, *Codex* 1.4.20 (Justinian 527/8), adding the requirement that three witnesses have to testify to a candidate's orthodox faith and John Lydus, *On Magistracies* III.12 (ed. Bardy, 150). Justinian also legislated against advocates (or any other kind of official or person of rank) who claimed to have received an orthodox baptism, but whose family members remained heretics: Justinian, *Codex* 1.5.18, 5 issued between 527 and 529AD and Justinian, *Codex* 1.11.10, 6, no date extant).

Justinian's *Digest* in 530 states that the authority of law sets both divine and human affairs in good order (*Const. deo auctore* 6 = Justinian, *Codex* 1.17.1.1; further discussion in Humfress 2016). Having already claimed the right to act as the sole maker and interpreter of Roman law (Justinian, *Codex* 1.1.4.12, 529; also Justinian, *Novel* 105.2.4, 537), Justinian also claimed the right to make and interpret Christian scripture (Justinian, *Novel* 131.1 (545), issued during the Three Chapters controversy (see further Chazelle and Cubitt 2007)).

Modern scholarship on law in the age of Justinian has tended to focus upon the Emperor himself ('autocrat' and/or 'caesaropapist'; Dagron 2003 and Kaldellis 2015, the latter critiquing the idea of Byzantium as a 'rigid imperial theocracy'), his legal officials (especially Tribonian, John Lydus, Junillus Africanus; Honoré 1978, Maas 2003 and Maas 1992) and his legal texts (the *Codex Repetitae Praelectionis*, 534; the *Digest* and the *Institutes*, 533 and the Justinianic *Novels* or 'new laws' that post-dated the codified collections; Humfress 2005). As we have already seen, however, Justinian's legal reforms should be placed within the framework of a much broader shift in what present-day lawyers and legal historians would term 'legal culture': "...those values and attitudes in society that determine what structures are used and why; which rules work and which do not, and why" (Friedman 1969, 35). In the heavily classicizing and anonymous sixth-century work known today as the *Dialogue on Political Science*, two interlocutors - possibly to be identified with Menas, Urban prefect of Constantinople and Praetorian Prefect of the East from 528-9, and Thomas, a *Quaestor of the Sacred Palace* in the late 520's (the highest legal minister within Justinian's bureaucracy) - critique Justinian's regime by constructing an ideal *politeia* in words. In the course of book five, Menas explains to Thomas that: "Imperial rule...is concerned with affairs of state. It has as its goal, the well being of the state in accordance with justice. Its completion consists in putting this into practice with the benefit which necessarily follows from this: the salvation of men." Menas continues: "There is no one, I think, who could doubt this". To which Thomas

replies, “Absolutely no one, at any rate, who had any understanding of culture (*paideia*)” ('Dialogue on Political Science', 5.14, trans. Bell 2009: 148). According to the author of our sixth-century dialogue, imperial rule – in the sense of legitimate political practice, just administration of the law, and the salvation of men's souls – was to be understood within the context of a much broader set of elite, cultural, Constantinopolitan values.

The formation of an imperial, Christian and Roman, legal culture in the sixth-century Roman East was not limited to legislative ideology or elite works of political theory, it also brought about concrete changes to legal and bureaucratic practices. An imperial constitution from 530, for example, orders that a physical copy of the Holy Scriptures (*scripturae sacrosanctae*) must be placed before all judges (and arbitrators) who hear cases according to Roman law, whether in the City of Constantinople or in any other place across the Empire (Justinian, *Codex* 3.1.14). Simply by looking upon the Holy Scriptures, the presiding judge would be consecrated by the presence of God and aided by a higher power: "...knowing that they judge others no more than they are judged themselves..." (Justinian, *Codex* 3.1.14, 2 trans. Blume). The threat of God's (eschatological) judgment also appears in papyrological reports of Justinianic courtroom proceedings.⁶ As we have already seen, Justinian ordered that all legal officials - from those employed in the central Palatine ministries down to provincial judges, advocates and other court officers - had to be baptised orthodox Catholics. This 'imagined community' also provided the institutional touchstone for Justinianic reforms to judicial oath-swearing. Justinian's *Novel* 8, addressed to the Praetorian Prefect John ('the Cappadocian') and issued in 545 as the first in a series of imperial constitutions to reform provincial government, included the text of a new oath of loyalty to be sworn by provincial governors at their investiture ceremonies. This new formula ends with "an imprecation that if

⁶ Humfress 2007b. Alongside other measures, Justinian's *Novel* 146 (553) laid down harsh penalties for any Jews who denied the Last Judgment, the resurrection of the dead, 'or that angels are part of God's work creation' - see further Smelik 2012.

[a Provincial Governor] should violate his oath he would experience the fate of Judas and the leprosy of Gehazi and the trembling of Cain" (Pazdernik 2012: 152, also citing Procopius' reference to the oath and curse at *Secret History* 21.16-19). As Pazdernik states: "Justinian's *Novel* 8 appears to be the earliest attested instance in which the so-called 'Judas curse', that would go on to exercise a considerable influence over the imagination of both the Byzantine east and the medieval west, appears in an official document" (Pazdernik 2012: 152). Constantine may have been the first Roman emperor to be baptised a Christian, but Justinian was the first Roman emperor to envision a new, Christianized, Roman legal cosmos (Humfress 2005. On earlier, fifth-century, developments see Humfress 2014 and Humfress 2016).

Over the last two decades, 'late' or 'postclassical' Roman law (broadly 3rd to 7th centuries, including the recently defined era of 'epiclassical' Roman law from c.235-c.300 to the era of Justinian) has become established as a field of legal and historical research in its own right (Humfress 2013a for bibliography). Recent scholarship has focused on the relationship between imperial power and Christian belief during this postclassical period, especially in relation to Constantine (Harries 2010 and Dillon 2012) and Theodosius II (Millar 2006).⁷ There have also been important new studies of late Roman, Byzantine and early medieval ecclesiastical ('canon') law (Wagschal 2015; Humfress forthcoming for bibliography), and those that, either implicitly or explicitly, challenge the existing frameworks of Christian 'triumphalism' and late Antique 'transformation' by focusing on the multiple and diverse ways that Christians talked and argued about Christian law within this period (Van Nuffelen, 2016; Doerfler, 2013; López, 2013; Layton, 2007). Christian ecclesiastics, monks, and ascetics were not - of course - only writers of texts; they were also,

⁷ Further bibliography in Girardet 2009 and Humfress 2016.

to varying extents, 'doers' of Roman law (Humphress 2015: 109).

Before Constantine, Christian clerics owned property (including land and slaves), paid taxes, some inherited as heirs, some married and divorced, some engaged in business and trade etc. One reason why Roman law appears in early Christian writings is because early Christian writers used Roman law and Roman legal institutions in everyday contexts. As we shall see in Section 1 ('A *New Legal Cosmos?*') below, Constantine did not legalise Christianity. Nonetheless, the extensive imperial support and patronage that he granted to (Catholic) churches and clerics, alongside other groups and individuals, opened up the Roman legal arena to Christians - acting *as* Christians - to an extent that was unimaginable before the fourth century. In Section II ('A *New Legal Cosmos?*') we will focus on one specific example: the imperial grant of permanent 'defenders' (advocates) to Christian churches, made in response to a planned and co-ordinated initiative from a group of early fifth-century North African ecclesiastics. In Section III ('A *New Legal Cosmos?*'), we will turn briefly to late Roman imperial law and its cosmological context.

I. A NEW LEGAL COSMOS?

"You may expel Grand Narratives with a pitchfork but they will always return, as Horace might have said to Lyotard"
(Reuter 2006: 7).

In 260 the Roman emperor Valerian was captured by Sasanian troops at the Battle of Edessa (according to later legends the Sasanian King of Kings Shapur I used Valerian as his footstool, before having him skinned alive, stuffed with straw and put on display). Shortly afterwards his son, Gallienus - now sole emperor - issued a law confirming the end of his

father's anti-Christian persecution. Valerian's second persecution edict, issued in 258 and endorsed by the Roman Senate, targeted Christian clergy - ordering them to supplicate to the gods and to cease celebrating rituals or holding assemblies in cemeteries. It also targeted prominent lay Christians and their property: "Bishops, presbyters and deacons should be punished immediately; senators, *virii egregii*, and knights should lose their dignities and be deprived of their property. If they still persisted in their Christianity they would be executed. *Matronae* [married women with high social status] would lose their property and be banished. *Caesariani* [officials belonging to the imperial household] would be reduced to slavery and sent in chains to work on the imperial estates" (Whitehorne 1977: 195, quoting Cyprian *Ep.* 80.1). Accordingly, Gallienus' 260 Edict not only confirmed the end of his father's measures - making peace with the god of the Christians as part of a renewed *pax deorum* - it also provided explicitly for the restoration of confiscated property. We only know of Gallienus' 260 Edict via two rescripts that he issued around 262 and 263 in response to petitions from Christian bishops (later copied and translated by Eusebius of Caesarea in his *Ecclesiastical History*: Barnes 2010: 96-105). On both occasions, the two (different) groups of Christian bishops complained that property that should have been returned to them was not; both times Gallienus responded positively, confirming his previous edict. Less than a decade later we find bishops appealing to the Emperor Aurelian against the (deposed bishop) Paul of Samosata's continued possession of "the house of the church" at Antioch (Millar 1971). These examples from the reigns of the late third-century emperors Gallienus and Aurelian suggest that groups of Christian ecclesiastics were beginning to function as what the legal sociologist Marc Galanter termed 'repeat players': claimants "...who are engaged in many similar litigations over time", as opposed to 'one-shotters' who "...have only occasional recourse to the courts" (Galanter 1974: 3).⁸

⁸The late Roman legal system fits all of Galanter's pre-requisite assumptions for his model to apply.

According to Galanter, the 'repeat player' [RP] / one shotter [OS] distinction' is crucial because it is organisations that generally have the (financial) resources and institutionalised knowledge to enable them to act as 'repeat-players'. The RP, unlike the OS, can "play the odds"; he "can play for rules as well as immediate gains", expending "resources in influencing the making of the relevant rules by such methods as lobbying. (And his accumulated expertise enables him to do this persuasively.)"; the RP can also "play for rules in litigation itself, whereas an OS [one-shotter] is unlikely to" (Galanter 1974: 6). This last point is worth emphasizing: "Because his stakes in the immediate outcome are high and because by definition OS is unconcerned with the outcome of similar litigation in the future, OS will have little interest in that element of the outcome which might influence the disposition of the decision-maker next time around. For the RP, on the other hand, anything that will favourably influence the outcomes of future cases is a worthwhile result." 'Repeat players' are thus "concerned with the rules which govern future cases of the same kind" (Galanter 1974: 6). Galanter's model helps us to understand two fundamental facts about the relationship between Christianity and Roman law from the third to seventh centuries: first, whether or not Roman law categorised the Christian Church (singular) or Christian churches (plural) as corporate bodies, Christians conceived of themselves as belonging to a communal body (*corpus*) united in Christ, with distinctive Holy Scriptures, customs and traditions and, by the later third century at least, internal institutionalised structures. Many ecclesiastics and other prominent Christians communicated with each other in person, by letter and through written texts - they shared knowledge, information and strategies. Churches also had financial resources, including the patronage of wealthy and influential lay persons. They had the resources to function, in other words, as 'repeat players' within the Roman legal system. Second, precisely because they were repeat players, Christian ecclesiastics played for rules as well as for immediate gains. In other words, they changed the Roman legal system through

their use of it.

How Christian ecclesiastics - and, as we shall see, factional groups within that broad category - functioned as 'repeat players' in the Late Roman legal system can be traced through a number of different concrete examples. We have already seen two instances of bishops in the 260's seeking imperial redress for the return of confiscated property. These continued into the 300's and 310's, as the emperors Constantine, Licinius, and Maximin variously ordered the restoration of Christian property confiscated during periods of persecution (Eusebius, *Ecclesiastical History* 9.10 and 10.5; see also Justinian, *Codex* 7.38.2, 387). In a letter of 312 addressed to the Proconsul of Africa, Anulinus, the emperor Constantine ordered that property was only to be returned to the 'Catholic' church of the Christians - hence, from the early-fourth century onwards, intra-Christian legal disputes over the return of confiscated property could also involve disputes over Christian orthodoxy and/or orthopraxy.⁹ Constantine also specified that the various tax breaks, immunities, donations, gifts and exemptions that he extended to Christian clerics (and their wives, children and servants) were to benefit Catholics only (Eusebius, *Ecclesiastical History* 10.6 and 10.7; also *Codex Theodosianus* 16.2.1-2 (313) and 16.2.10, re-dated to 320).¹⁰ Throughout the fourth to sixth centuries we find groups of Christian ecclesiastics petitioning the emperors for immunities, gifts and tax exemptions - prompting further legislation and legal clarifications (Jones 1964, 1382 fn.101 and 1178-9 fn. 52). We also find bishops objecting to immunities, gifts and tax exemptions still being granted to other beneficiaries: the traditional Roman cults (as in the so-called 'Altar of Victory debate': Croke and Harries 1982). Late Roman churches operated within an already existing structure of property ownership, which Christian clerics worked

⁹ For example, Optatus, *Against the Donatists*, Appendix 10. On legal disputes over ecclesiastical property resulting from sentences of deposition and exile against late Roman bishops see Washburn, 2013.

¹⁰ These measures originally applied to the Western empire (i.e., the territory ruled by Constantine before 324) but were extended by Constantius 356/7 (*Codex Theodosianus* 16.2.14).

both within and upon. Further concrete examples of how ecclesiastics acted as 'repeat players', changing the late Roman legal system through their use of it, can be traced through the fields of inheritance law (Humfress at press), legal procedure (Humfress 2013b), and beyond (Humfress 2011).

II. A NEW *LEGAL* COSMOS?

"Parties who have lawyers do better."

(Galanter, 1974: 21)

In the late empire, as in the early empire, legal processes demanded the attention of lawyers. And lawyers, as Galanter notes, are themselves repeat players (Galanter, 1974: 21). Within the late empire there were two broad types of Roman lawyers who pleaded cases on behalf of the Church. The first type can be identified as ecclesiastics who had received specific training in forensic rhetoric and less frequently in Roman law itself. Key fourth-century and fifth-century ecclesiastics had been trained in forensic rhetoric as part of their education in the rhetorical schools of the late empire. This expertise allowed some ecclesiastics to participate effectively in the legal hierarchy of the imperial bureaucracy. They pleaded at the imperial court for privileges and exemptions, they argued for the extension of case-specific rescripts before praetors and proconsuls, they sought the promulgation of new imperial legislation and then transformed its content by applying it to analogous cases (Humfress 2007a).

[Insert Figure 32.1 here]

[caption] **Figure 32.1** Diptych of Anicius Petronius Probus, consul (Rome 406). Aosta,

The fourth century is marked by increasing attempts to regulate the admission of legal practitioners into sacerdotal offices. At the Council of Serdica in 343 Bishop Ossius revealed that forensic advocates were of crucial importance to the post-Constantinian Church through his tacit admission that they were being promoted straight to episcopal sees:

Bishop Ossius said: 'I consider it necessary that this be gone into with all care and attention: If some rich man or forensic advocate is thought worthy of becoming a bishop, he should not be established (in this station) until he has served as lector and deacon and presbyter.'

(Council of Serdica, Canon 10)

This practice of promoting forensic advocates, however, posed a certain dilemma for a late imperial church intent on a rhetoric of other-worldly separation. Two decretals of Pope Siricius (384–398) raise the question of whether those who have distinguished themselves in forensic careers should be admitted to the priesthood at all. In one decretal Siricius forbids their ordination, basing his interdiction on the apostolic precepts of the early Church. Elsewhere, however, an elegant solution is offered, enabling imperial functionaries to be ordained after they had undertaken penance. In the early fifth century Pope Innocent I directed the attention of the bishops of Spain to one specific aspect of the ordination of individuals with pretensions to forensic practice: it had come to his attention that a number of ecclesiastics continued to plead as advocates in the court rooms of the late empire even after their ordination as priests.

[Insert Figure 32.2 here]

[caption]**Figure 32.2** The San Nazaro reliquary, depicting the Judgement of Solomon. Silver gilt casket dedicated in 386 and interred beneath the main altar of St Ambrose's Basilica Apostolorum. Milan, Tesoro del Duomo. © Hirmer Verlag München.

The second type of Roman lawyer who pleaded on behalf of late antique Churches was the practicing professional advocate. A relatively frequent *topos* in Christian martyr literature is the 'professional' advocate pleading before the imperial magistrate *pro causa Christianorum*. The Acts of the martyr Maximilianus record a trial held in 177–8 in which an advocate, Vettius Epagatus, pleaded in defence of his brothers who were accused of being Christians. In his *Ad Scapulam* 4.3–5 Tertullian outlines the role that professional advocates could assume, even if their intervention had not been requested by the accused. He states that governors of the province could legally acquit Christians if they wished – as the proconsul Gaius Julius Asper had. The proconsuls, urges Tertullian, should consult the advocates stationed at their courts in order to advise themselves regarding the various strategies that would permit them to find the accused not guilty. Tertullian was well aware that potential martyrs might refuse forensic assistance, preferring to plead for martyrdom themselves.

The relationship between Christians and professional advocates within the pre-Constantinian Church was not always an uneasy one. The *Acts of St Sebastian* state that in 286 Caius, Bishop of Rome, instituted a *defensor*. Some modern scholars refer to this passage as the first reference to the institution of the *defensor ecclesiae*. However, they are mistaken in dating the creation of this office as early as the late third century. Caius employed a *defensor* for a particular case, just as Vettius Epagatus had been employed as an advocate *pro causa Christianorum* in 177–8 – he did not create a new permanent forensic office.

As we have already seen above, the post-Constantinian Church had more scope for legal

action. No longer the persecuted sect, ecclesiastics could now invoke imperial officials to intervene in their internal disputes on a more regular basis. In 315 the Church in Carthage split into two factions, each driven by perceptions of what the other had done (or not done) during the previous period of persecutions (see further Miles 2016). The dispute reached the court of the proconsul, thus instituting the first great legal process of what came to be termed the ‘Donatist schism’. The acts of the 315 case reveal that advocates, drawn from professional corporations, were employed to argue the case for both sides. The fact that the originators of the split (c.312) had been the subject of judicial proceedings during the early reign of the Emperor Constantine set the framework for the fourth-century and early fifth-century development of the controversy. From the outset both ‘Catholics’ and ‘Donatists’ employed professional advocates to argue their case. The dossiers that these professional advocates constructed were duly entered into the legal *acta* and thenceforth set out precedents that could later be claimed by each side in the dispute. These forensic dossiers (comprised of verbatim extracts from the court proceedings, imperial letters and the acts of ecclesiastical councils) were of crucial importance to both theological polemic and future concrete legal cases (Shaw 2011).

In 368 Damasus, Bishop of Rome, employed professional advocates in a legal case - again concerning an internal schism, but this time within the Church at Rome itself. The background to the dispute is complex; here it is only necessary to note that *defensores* – acting on behalf of the faction represented by Damasus against a rival faction led by Ursinus – petitioned the Urban Prefect for the restitution of a basilica. The case was referred to the Emperor Valentinian and the imperial reply was issued as a rescript.¹¹ Valentinian’s text clearly refers to *defensores ecclesiae urbis Romae*. Accordingly modern historians have cited

¹¹ The rescript is included in the *Collectio Avellana* (Guenther (ed.), 1895: 49, lines 1–17). The *Collectio Avellana* also records that Damasus had previously employed ‘pagan advocates’ to persecute Catholic presbyters and laymen (Guenther (ed.), 1895: 30, lines 4–10).

368 as the first reference to the 'medieval' institution of the *defensor ecclesiae* (for example Pietri 1976: 678). Once again, however, this dating is mistaken. Valentinian's rescript also specifies that the *defensores ecclesiae urbis Romae* are charged by special procuration with the interests of Damasus himself. The *defensores* in 368 were not permanently mandated to defend the interests of the Church at Rome, but rather appointed *ad hoc* to defend the interests of a named individual in a concrete case.

The creation of permanent *defensores* mandated to act in all cases and processes in the interests of the Church is in fact datable to the early fifth century and was not a 'papal' initiative, but was occasioned by the 'Catholic' North African Church. The official creation of the *defensor ecclesiae* can be traced to a single legislative act of the Emperors Honorius and Theodosius (excerpted at *Codex Theodosianus* 16.2.38), but the suggestion for this new institutionalized office came from a group of North African bishops. More specifically, the establishment of this new type of Christian Roman lawyer was forced by the repeated pleadings of North African clerics for the right to have a permanent legal representative. As we shall see, an examination of how these bishops framed their pleas to the imperial court can be followed through their deliberations in the ('Catholic') North African Church councils of 401 and 407. Their requests were founded deliberately on Roman legal precedents: the 401 plea (which we can assume to have been unsuccessful) was framed by an analogy with the existing legal office of 'the defender of the city' (*defensor civitatis*). The successful 407 plea was framed by a striking analogy with the legal privileges traditionally accorded to the 'pagan' imperial cult. Thus the bishops of North Africa invoked a deliberate translation of a 'pagan' legal precedent into the Christian arena, for the benefit of the Christian Church. Of the two types of Roman lawyers employed by the Christian Church, it was the first who effectively created the second out of the institutions of the 'pagan' past.

PLEADING FOR DEFENSORES ECCLESIAE: THE FIRST ATTEMPT

As we have seen, the Donatist dispute was, to a significant extent, played out in the courtroom. Both Catholics and Donatists litigated for the right to be regarded as the orthodox representatives of Christianity and by its very nature this litigation involved the preparation of a large number of often complex legal cases. The ‘Catholic’ North African Church needed permanent skilled advocates to represent all its interests, rather than repeatedly mandating individuals on an *ad hoc* basis for single cases. However, in seeking the creation of a permanent *defensor* the North African Church had to operate within a framework already established by Roman law. The North African Church was not juridically competent simply to appoint a permanent *defensor* for itself.¹² It was a fundamental principle of Roman law that civil persons could not appoint a permanent individual to represent them in all the processes which they had to, or might, pursue. According to the Roman jurist Paul, however, corporate bodies had the right to request a permanent ‘actor’ or ‘syndic’ who could be appointed to act in all cases (Justinian, *Digest* 3.4.6.1). Yet in the early fifth century the Church as a whole was in an ambiguous position with reference to the legal recognition of its corporate status. The North African bishops were alert to this fact.

The faculty of permanent *defensores* was first requested by a Council of Carthage held on 13 September 401. The discussion earlier in the day had arrived at an unequivocal formula for viewing the universal Church as a corporate body. Moreover, this request for *defensores ecclesiae* was framed using the precedent of the *defensores* of the cities – the permanent processual representatives who acted for the municipal corporations. The North Africans thus attempted to bolster their request by an analogy with a corporate body already unambiguously accorded the status of a juridical person in Roman law. It is to this first attempt to plead for *defensores* of the Church that we shall now turn.

¹² *Contra* Merdinger 1997: 105 who assumes that the ‘African fathers’ autonomously created the position of *defensor ecclesiae* in order to relieve themselves of ‘business-related problems’.

ON SEEKING ADVOCATES FOR THE CHURCHES FROM THE EMPEROR.

Resolved, let it be requested of the universal emperors, on account of the sufferings of the poor, whose troubles burden the church without intermission, that defenders be assigned to them against the power of the rich, through the foresight of the bishops.

(Canon 11, Council of Carthage 13 September 401: Munier (ed.) 1974: 202, lines 686–

90)

With this canonical resolution from the September 401 Council of Carthage, the North African Church announced its intention of pleading at the imperial court for the faculty of permanent *defensores*. The canon also agreed upon the manner in which the plea was to be framed: the *defensores* were sought for the defence of the poor against the powerful rich. In 368 the Emperor Valentinian had granted the Illyrian municipalities the right to institute permanent *defensores* using the same reasoning:

Emperors Valentinian and Valens to Probus, praetorian prefect. We have decreed to their benefit that all the plebians of Illyricum shall be defended by the offices of advocates against the outrages of the powerful.

(*Codex Theodosianus* 1.29.1)

The constitution goes on to specify that these ‘defenders’ were to be selected from individuals who have occupied high positions within the imperial bureaucracy or else practised as forensic advocates. A further constitution issued at Constantinople in 385, addressed to a certain Theodorus *defensor civitatis*, (*Justinian, Codex* 1.55.4), states that defenders of the cities should act as ‘parents’ to the common plebians, protecting city-dwellers

and country-dwellers alike from unjust demands and exactions.¹³ The late fourth-century imperial formalization of the *defensor civitatis* provided a persuasive precedent that the North African Church could appeal to in seeking to establish its own *defensores*. If the emperors had already acknowledged the necessity of protecting the *plebs* against the outrages of the *potentes* with respect to the corporate bodies of the municipalities, how could they refuse to grant defenders to the corporate body of the Church for the same purpose? We have no record of the outcome of their plea. However, six years later the same bishops had occasion to appeal to the emperors once again for the faculty of permanent *defensores*. The 401 attempt seems to have failed, whereas the 407 plea succeeded (Martroye 1923: 620). In 407, however, the bishops presented the imperial authorities with a different precedent for their request.

PLEADING FOR DEFENSORES ECCLESIAE:

THE SECOND ATTEMPT

Let it be resolved that the envoys Vincentius and Fortunatianus, who are about to set out to represent all the provinces, should request of the most glorious emperors that they accord the faculty for the establishment of defenders taken from the body of advocates who are employed in law cases as advocates for the defence, so that, as is the custom with provincial high-priests, those who have undertaken the defence of the Church should be empowered to enter the chambers of judges as necessity demands, so as to resist what is urged on the other side or so as to give whatever advice might be necessary.

By this canonical resolution from the Council of Carthage, 13 June 407, the bishops Vincentius and Fortunatianus were charged with a very specific mission: to plead at the

¹³ On the development of the office of *defensor civitatis* see Frakes 2001.

imperial court for the faculty of *defensores* who would be chosen from among the corporate body of advocates (termed *scholastici*). Vincentius and Fortunatianus were to request that these defenders should have the right to represent the Church in all cases, ‘as is the custom with provincial high-priests’. This phrase, *ut more sacerdotum provinciae*, was crucial to the Africans’ plea. They were in fact requesting the right of permanent legal representation modelled on the permanent legal representation that the imperial cult already enjoyed, through the faculty of the provincial priesthood.¹⁴

Under the early empire the *sacerdotes provinciae* had been accorded special rights and privileges in their capacity as permanent *defensores* of the patrimony of the imperial cult. During the later empire they remained responsible for presenting the pleas of each provincial council to the imperial court.¹⁵ To this end the Emperor Constantius had decreed that their members should be drawn exclusively from corporations of practising advocates (*Codex Theodosianus* 12.1.46 [355]). The 407 North African church council thus requested the same qualification for their *defensor ecclesiae*. *Sacerdotes provinciae* also held the right to collect rescripts granted in response to their pleas directly from the imperial court. This was an important privilege. Any imperial rescript had to be registered in the *acta proconsularis* before it could be cited in a legal controversy, but the *sacerdotes provinciae* could bypass the usual (lengthy) bureaucratic channels for the transmission of documents and carry the rescript themselves to the provincial magistrates’ court, thus ensuring prompt action. This privilege was particularly important to the 407 Council of Carthage, convened within the period immediately after the ‘acting Emperor’ Stilicho’s policy of toleration towards the Donatists. In the immediate context of Stilicho’s fall from power, it was imperative that the North

¹⁴ Modern scholars agree on this interpretation of *sacerdotes provinciae* as the provincial priests of the imperial cult: Martroye 1921: 242 and 1923: 597; Mochi Onory 1933: 177; and Fischer 1956: 656.

¹⁵ Chastagnol 1994: 93–104 places the office of the provincial priesthood within the wider context of the survival of the imperial cult in North Africa, until the Vandal regime. *Codex Theodosianus* 16.10.20 (415), 12.1.186 (429) and Valentinian *Novel* 13 (445) testify to the fact that the ‘political’ dimensions of the provincial priesthood survived well into the fifth century.

African 'Catholic' bishops act quickly in the application of any new anti-Donatist imperial legislation, thereby frustrating Donatist appeals to Stilicho's authority. The 407 council also requested that its *defensores ecclesiae* should 'have the ability to enter into the private audience chamber of the judge each time they deem it necessary, so as to resist what is urged on the other side or to advise whatever might be necessary'. The free right of access to the private council chambers of magistrates had already been granted to both *sacerdotes provinciae* and *defensores* of the cities. This privilege of freely entering the judges' private audience chamber carried with it the more important right to be present when the judge was deliberating his sentence (*Codex Theodosianus* 6.26.16, 410). The *defensores* could thus directly influence the outcome of any concrete case that fell within their jurisdiction.

These requests were answered, point for point, by a constitution of the emperors Honorius and Theodosius dated 15 November 407, addressed to the Proconsul of Africa (*Codex Theodosianus* 16.2.38.) There is evidence to suggest that the text of the original constitution also included a forceful restatement of previous legislative measures against Donatists and pagans. The emperors Honorius and Theodosius provided the North African Church with a firm legislative basis on which prosecutions against Donatists could proceed, and also supplied the faculty of permanent *defensores* who could argue the resulting cases at law. The emperors Honorius and Theodosius can thus be said to have 'created' a new category of forensic practitioner: the *defensor ecclesiae*, a permanently mandated 'professional' advocate capable of acting for the Church in all legal cases. The elaboration of this office was, however, provoked by the carefully phrased demands of the North African Church itself. The canonical resolutions from 401 and 407 reveal the North African bishops as skilled 'repeat players' within the Roman legal system. In this respect, the process lying behind the legislative creation of the *defensor ecclesiae* is as important as the institution itself.

After 407 the privilege granted to the North Africans was extended to other churches. For

example, Innocent I used a group of *defensores ecclesiae* to expel a group of 'Photinian' heretics from the city of Rome. In a letter most likely written towards the end of his pontificate, Innocent suggested that Laurentius (possibly bishop of Senia, Croatia or Siena, Italy), should "... approach the provincial authorities himself and ask for an extension in the application of the Roman ruling to Lawrence's own church" (Innocent I, *Ep.*41; Dunn 2012: 148). By the mid sixth century the duties associated with the office had expanded to include the enforcement of disciplinary measures against clergy, monks and laity; summons, arrests and judicial hearings of accused monks and clerics; involvement in sanctuary and asylum cases; forwarding complaints and petitions to high-ranking legal officials in Constantinople; and the registration of marriages and wills (Council of Chalcedon, 451, canon 23; Justinian *Codex* 1.12.6, 6 and 10, 466; 1.3.32(33), 2, 472; 1.12.8, no date; Justinian, *Novel* 56, 537; Justinian *Novel* 74.4, 538; and Justinian Novel 117, 542). As bishops assumed wider civic responsibilities related to the day-to-day administration of early medieval society, so their need for legal assistance in handling those responsibilities increased (Mochi Onory 1933: 174–8; Pietri 1976: 677–9; Zovatto 1966; Pergameni 1907: 9–51).

III. A NEW LEGAL *COSMOS*?

Do you not know that the saints (*hagioi*) will judge the world? And if the world is to be judged by you, are you incompetent to try trivial cases? Do you not know that we will judge angels— to say nothing of ordinary matters?

(1 Corinthians 6:2-3)

According to the Apostle Paul, writing in the mid-first century to the (fractious) Christian community that he had founded in Corinth only a few years earlier, eschatological

judgment: God's Last Judgment of the rational cosmos, is closely related to human judgment: the resolution of trivial, ordinary, affairs in the here and now. At the Last Judgment, the 'saints' (the 'holy', *hagioi*) - and Paul seems to include the Corinthian Christians in this designation - will judge the angels and the world. How, then, can the Corinthian Christians possibly fail to resolve their own petty, day-to-day, disputes amongst themselves? Existing scholarship has tended to focus upon this Pauline passage as evidence that early Christians were encouraged to resolve disputes internally, within their communities. The eschatological framework underlying this Pauline text has received less attention. What Paul implies here is a new, Christian, legal cosmos in which the 'saints' function as privileged cosmic actors - their earthly judgments underpinned by their participation in the Final Judgment to come.

[Insert Figure 32.3 here]

[Caption]**Figure 32.3** 'Christ in the Roman Forum', dating from the period of Christian 'triumphalism' after the Theodosian settlement *c.*390, with the disciples garbed as senators. Rome, Church of Santa Pudenziana. Apse mosaic. Photo: Scala.

In the so-called *Didascalia Apostolorum* - translated into Syriac, possibly in the early fourth century, from a non-extant Greek text - the Christian bishop provides a direct link between eschatological and human judgment: "For the word of sentence which you [i.e. the bishop] decree ascends straightaway to God; and if you have justly judged, you shall receive from God the reward of justice, both now and hereafter; but if you have judged unjustly, again you shall receive the recompense from God accordingly" (*Didascalia Apostolorum* 2.49.1–50.3, trans. Connolly). The bishop's judgment ascends immediately to God, thus affirming his privileged relationship to the divine - notwithstanding the fact that his judgment will, in turn, be judged (Humfress 2011: 397-8). As the emperor Constantine put it in a letter

addressed 'to the Catholic Bishops', written shortly after the Council of Arles (314): "They [sc. the bishops who lost their case at the Council of Arles] demand my judgment, when I myself await the judgment of Christ. For I tell you, as is the truth, that the judgment of the priests [sc. the bishops at Arles] should be regarded as if God himself were in the judge's seat. For these have no power either to think or to judge except as they are instructed by Christ's teaching" (Optatus 1997: 190). Christian bishops were not simply 'repeat players' within the Roman legal system; they were 'repeat players' within a specific, eschatological, framework.

The desire to bring about a rightly ordered cosmos - in which Christian clerics would maintain proper contact with the Christian god on behalf of the empire and its inhabitants - also lies behind Constantine's grants of legal privileges and exemptions to catholic Christian churches and ecclesiastics. Catholic clerics were to be released from their compulsory burdens, personal and financial, so that nothing would interfere with their performance of the sacred rights and services owed to the highest (Christian) God.¹⁶ Heretical clergy, on the hand, were to be bound and subjected to compulsory public services (*Codex Theodosianus* 16.5.1, 326). On a cosmological scale, however, heretics were to be "eliminated like a poison from humanity": "...how many are the falsehoods in which your idle folly is entangled, and how venomous the poisons with which your teaching is involved, so that the healthy are brought to sickness and the living to everlasting death through you... Why then should we endure such evils any longer? Protracted neglect allows healthy people to be infected as with an epidemic disease. Why do we not immediately use severe public measures to dig up such a great evil, as you might say, by the roots?" (Constantine, 'Letter to the Heretics', Eusebius 1999: 151-2).

Between the fourth and sixth centuries a vast body of anti-heretical legislation was

¹⁶ Constantine, 'Letter to Anulinus' in Eusebius, *Ecclesiastical History* 10.7; compare *Codex Theodosianus* 16.2.2, 319 Seeck; 16.2.21 (371); Justinian, *Codex* 1.3.41(42), 24-27, 528 and 1.4.34pr, 534. On the Roman Republican background to this idea see Tellegen-Couperus 2012.

issued by the imperial authorities, far outnumbering the surviving laws against paganism. New legal categories and heresiological labels were elaborated case by case, as new heresies were identified and classified (Humfress 2007 and Humfress 2015). Advocates and legal experts could transform imperial legislation by applying it to particular cases, often provoking the need for further legislation to check their forensic activities. Focusing upon the creation, and crucially the application, of anti-heretical legislation transports us to the *axis mundi* of late Roman, imperial, Christianity. The 'cosmological historiography' of late Roman law itself, however, has yet to be written (quotation from Chin 2015: 100).

CONCLUSION

Legal techniques of interpretation, argumentation and analogous reasoning were important tools - amongst others - employed by 'repeat players': ecclesiastical and professional lawyers, in the service of the Late Roman institutional church. As Maria Doerfler states: "While not all realms of Christian discourse show identical degrees of saturation with Roman legal and judicial thought, none are completely free of it" (Doerfler 2013: 320). In this respect Late Antiquity bequeathed a fundamental legacy to the Middle Ages.

Late Roman law was effectively imperial law, 'the law of the emperors'. Every emperor who legitimately held the imperial office between Constantine and Justinian was, without exception, a baptised Christian (including 'the apostate' Julian). This fact alone might seem to suggest an inevitable, albeit slow and uneven, process of christianisation: from a pagan to a Christian Roman empire, from the christianities (plural) of the first three centuries to an imperial Christian church (singular) of late Antiquity.¹⁷ Until the reign of Justinian,

¹⁷ On 'christianisation' as a concept see Brown 1995 and Watts 2015.

however, the relationship between state-power, imperial law, and Christianity is better characterised by historians as one of bricolage: individuals and groups making repeated use of the tools at hand, creating new things out of old, changing the late Roman legal system through their use of it. Viewed from this perspective, Justinian's promotion of a thoroughly Christianised legal cosmos - a cosmos in which even the texts of Roman law explicitly invoke the Christian God as their author and patron - looks less like the culmination of an inevitable historical process and more like a distinctive, deliberately crafted, 'top-down' cultural shift. New scholarship on law, religion and legal culture in Sasanian Iran; Rabbinic Judaism; early Islam; and the Holy Roman Empire(s) of the medieval West promises to open up further, exciting, frameworks for comparative research.¹⁸

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¹⁸ Sasanian: Payne 2015 and Macuch, 2015; Rabbinic Judaism: Kanarek 2014, Secunda 2014, Dohrmann 2013, Simon-Shoshan 2012, Hidary 2010; early Islamic Empire: Tillier 2014, Zellentin, 2013 and Simonsohn 2011.

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